Solar Turbines Incorporated, Subsidiary of Caterpillar Inc. *and* International Association of Machinists and Aerospace Workers, Aeronautical Mechanics Lodge No. 685, AFL–CIO *and* Raymond Clifton McGee. Cases 21–CA–25694 and 21–CA–25687

March 11, 1991

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS CRACRAFT AND DEVANEY

On December 15, 1988, Administrative Law Judge Richard J. Boyce issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed limited exceptions and a supporting brief, and the Charging Party filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs[1] and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.

The judge found that the Respondent, by failing and refusing to reinstate 39 economic strikers immediately on the Union's unconditional offer on their behalf to return to work, violated Section 8(a)(3) and (1) of the Act. On review of the record, exceptions, and briefs we disagree with the judge and find that the Respondent did not violate the Act by failing to reinstate the economic strikers.

The Respondent manufactures aircraft engines. In order to prevent the hiring of individuals whose use of alcohol or drugs would impair their job performance, the Respondent requires preemployment drug and alcohol testing. On August 12, 1987,[2] during the course of an economic strike by the Union, the Respondent interviewed applicants for permanent employment to replace the strikers. On that day, over 50 applicants were offered and accepted permanent employment. At that time they were assigned badge numbers, job classifications, and departments and agreed to submit to drug and alcohol testing. Three days later, on August 15, the Union made an unconditional offer to return to work.

Those who had accepted the employment offers submitted to physical examinations and drug and alcohol testing from August 13 through 21. Of the 52 individuals who eventually commenced work in permanent positions, 13 were administered the tests before the Union's August 15 unconditional offer to return to work. Prior to the Union's offer to return to work, the testing laboratory reported to the Respondent that 7 of the 13 had passed. For the other 6 of these 13, the Respondent was not advised of the fact that they had passed until after the Union's August 15 offer. The remaining 39 replacements were tested after the August 15 offer, and reports that they had passed were thus not received by the Respondent, until after the Union's August 15 unconditional offer.

The Board has long held that in the absence of a legitimate and substantial business justification, economic strikers are entitled to immediate reinstatement to their prestrike jobs. *Laidlaw Corp.*, 171 NLRB 1366 (1968), enfd. 414 F.2d 99 (7th Cir. 1969), cert. denied 397 U.S. 920 (1970). One recognized legitimate and substantial business justification for refusing to reinstate economic strikers is that those jobs claimed by the strikers are occupied by workers hired as permanent replacements. *NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375, 379 (1967).

Job vacancies created by striking employees are considered to be filled by permanent replacements as of the time the putative replacements accept an employer's offers of permanent employment in the strikers' jobs. *Home Insulation Service*, 255 NLRB 311, 312 fn. 9 (1981), enfd. mem. 665 F.2d 352 (11th Cir. 1981). The Board normally regards the employer's hiring commitment as effectuating the permanent replacement of a striker even though the striker may request reinstatement before the replacement actually begins to work. *H. & F. Binch Co.*, 188 NLRB 720, 723 (1971), enfd. as modified 456 F.2d 357 (2d Cir. 1972); *Anderson, Clayton & Co.*, 120 NLRB 1208, 1214 (1958); see also *Superior National Bank*, 246 NLRB 721 (1979). Thus, determination of the replacement date turns on when a commitment to hire an employee for a permanent job was made and accepted.[3]

The judge found that the 13 individuals who took the test before the Union's unconditional offer to return were permanent replacements for the economic strikers because they ''effectively removed the contingencies attached to their hire.'' He further found that the remaining 39 individuals, who, like the 13, had accepted employment offers on August 12, but who had not yet taken the tests at the time of the Union's offer, had not removed those contingencies. In his view,

[1] The Respondent has requested oral argument. The request is denied as the record, the exceptions, and briefs adequately present the issues and positions of the parties.

[2] All dates hereafter refer to 1987 unless otherwise indicated.

[3] The question this case presents is distinct from the one the Board considered in *Star Tribune*, 295 NLRB 543 (1989). In that case, the Board concluded that an employer was not obligated to bargain over drug and alcohol testing of applicants for employment. In reaching this conclusion, the Board stated that ''applicants for employment are not 'employees' within the meaning of the collective-bargaining obligations of the Act.'' 295 NLRB 543, 546; see also fn. 10. The question before us here is not whether the Respondent was required to bargain with the Union before administering the drug and alcohol tests to the putative replacements. Rather, the question is whether the hiring commitment made to the prospective employees was sufficient to effect the permanent replacement of strikers.

those 39 did not have a commitment from the Employer to be hired and thus were not permanent replacements. The judge concluded that the Respondent violated Section 8(a)(3) and (1) by failing to reinstate the 39 economic strikers whose jobs were taken by those replacements.

The General Counsel and the Union contend that the only individuals who should be considered permanent replacements are the seven individuals whose test results were known by the Respondent before the Union's offer on behalf of the strikers to return to work. They argue that the Respondent's commitment to hire the strike replacements was deferred by the outstanding contingencies of physical examinations and drug and alcohol testing. They assert that those contingencies were not removed until the seven passed the tests and the results were communicated to the Respondent.

The Respondent, on the other hand, contends that the hiring commitment was made August 12, when the applicants accepted its offers of permanent employment. It asserts that the drug and alcohol tests were posthire conditions to active service, not prehire conditions of employment. We find merit in the Respondent's exceptions.

Unlike the judge, we find that the commitment to hire all 52 strike-replacement applicants was made when they accepted the offers of permanent employment for the strikers' jobs. Unlike our dissenting colleague, we conclude that those offers were offers of permanent employment, notwithstanding the testing contingencies.

On their acceptance of the offers, the replacements were assigned job classifications, work departments, and employee badge numbers, indicating that the Respondent was committed to hiring them as permanent replacements. On August 12, the replacements were told that they would have to submit to a physical examination and pass a drug screening test before they started work. The fact that 39 of the 52 replacements had not yet taken or passed their physical examinations or drug and alcohol tests, or that another 6 had taken their test but the Respondent had not been informed of the results, until after the Union's unconditional offer to return to work, does not detract from the Respondent's clear commitment to hire them as permanent replacements. This conclusion follows logically from the Board's decision in *Kansas Milling Co.*, 97 NLRB 219, 225–226 (1951). In that case the Board found that striker replacements who were offered permanent employment, but who were required to complete a 30-day probationary period, were permanent replacements even if they had not completed the 30-day period by the date on which the strikers made unconditional offers to return. Accord: *Guenther & Son*, 174 NLRB 1202, 1212 (1969), enfd. sub nom. *Pioneer Flour Mills v. NLRB*, 427 F.2d 983 (5th Cir. 1970); *Anderson, Clayton & Co.*, 120 NLRB at 1214. The reasoning adopted by the Board in *Kansas Milling* was as follows (id. at 226):

> When hired they were assured that they would retain their jobs not for a period of limited duration but indefinitely, provided only they proved themselves qualified. True, the ultimate determination of whether they were to be retained on a temporary or permanent basis was deferred. But when the qualifying condition was met with the passage of 30 days' employment, it established their status *ab initio* as that of permanent replacements for the striking employees whom they displaced. Although their status was still probationary on October 18, 1947, the Respondent was not required on that day to discharge them to make room for returning strikers who had unconditionally applied for reinstatement. In hiring these employees originally on a probationary basis, the Respondent was following its normal employment practices, and it was entitled to avail itself of the full qualifying period before determining whether or not these employees should be accorded the status of permanent employees.

Those employees who did not survive the probationary period were deemed ''potentially permanent'' employees. Ibid. ''But when the potentiality of their permanent status was eliminated by their termination within the 30-day qualifying period, the Respondent could no longer regard the position they had occupied as having been permanently filled.'' Ibid. Contrary to our dissenting colleague, we do not agree that *Kansas Milling* and its progeny are inapposite because, in his words, they did not involve conditions that must be removed ''before hire.'' In our view, the replacements here had been hired, and their commencement of work as permanent employees was subject merely to satisfying the Respondent's ''normal employment practices,'' i.e., completion of the postinterview tests.[4] As the Supreme Court observed in *Belknap, Inc. v. Hale*, 463 U.S. 491, 504 fn. 8 (1983):

> That the offer and promise of permanent employment are conditional does not render the hiring any less permanent if the conditions do not come to pass. All hirings are to some extent conditional.

A fortiori, so long as the replacement workers and the Respondent intended that the workers' employment

[4] Our dissenting colleague stresses the conditional nature of the job offers by pointing to the Respondent's policy manual reference to ''pre-employment screening practices.'' We do not find this phrase fatal to a finding that a commitment was made to extend a permanent position. The Respondent's manual does not necessarily use the phrase ''pre-employment'' as a term-of-art connoting the lack of a hiring commitment. We note that the same manual uses the term ''pre-employment screening'' in discussing recalled employees, whom we would not consider merely applicants.

not terminate at the conclusion of the strike,[5] the fact that the replacements had yet to complete these postinterview tests at the conclusion of the strike did not render them temporary workers subject to discharge.

We therefore conclude that, on August 12, the Respondent made a hiring commitment sufficient to effect the permanent replacement of the 52 strikers. The Union's unconditional offer to return to work was made August 15. Because the hiring commitment occurred before the Union's offer to return to work, those jobs were filled. We therefore reverse the judge's finding that the Respondent violated Section 8(a)(3) and (1) of the Act by failing to reinstate the 39 strikers to their prestrike jobs.

ORDER

It is ordered that the complaint is dismissed.

MEMBER DEVANEY, dissenting.

In this case, the judge found that the Respondent, by refusing to reinstate 39 out of 52 economic strikers upon the Union's unconditional offer to return to work, violated Section 8(a)(3) and (1). My colleagues find that the failure to reinstate these strikers was not unlawful because the Respondent had made a definite commitment to hire permanent replacements for each of these positions before the strikers' offer to return. I disagree with my colleagues and with the judge; I find that the Respondent had replaced only 7 of the 52 strikers when the strike ended, and that, as to the other 45, the applicants for their jobs had not removed the conditions on their employment imposed by the Respondent. In my view, the Respondent's offers of employment for all 52 positions were contingent on the applicant's successful completion of a screening procedure. Only the seven applicants who removed the obstacles to their employment by passing the tests and receiving the positive results before the strike ended are, in my view, permanent replacements. As to those who had not completed the test procedures or whose results had not been received by the Respondent when the Union offered to return, I would find that the Respondent's conditional offer of employment had not ripened into a definite commitment to hire when the strike ended and, thus, that the Respondent had not made a firm commitment to employ these replacements before the end of the strike.

The key facts are not in dispute. The Respondent requires all job applicants to submit to drug and alcohol testing. As its policy manual states, it ''will utilize preemployment screening practices . . . to prevent the hiring of individuals whose use of alcohol or drugs would impair job performance'' (emphasis added). All applicants are required to sign an acknowledgement that their refusal to submit to the tests waives ''any possibility of employment'' with the Respondent. Applicants who do not pass the tests are denied employment. On August 12, 1987,[1] during a strike by the Union, the Respondent interviewed potential replacements. That day, the Respondent conditionally offered jobs to more than 50 applicants and assigned them badge numbers, job classifications, and departmental slots. The offers of employment hinged on successful completion of the physical and the drug and alcohol screening procedure. By August 15, the date of the strikers' offer to return, 13 applicants had taken the tests, of whom 7 had received acceptable results and 6 had not yet received their results; 39 had not been tested. The judge found the 13 applicants who had taken the tests were permanent replacements but the remaining 39 were not. The General Counsel and the Union argue that only the 7 applicants who had received acceptable results were permanent replacements while the Respondent argues all 52 applicants were permanent replacements. My colleagues agree with the Respondent. I agree with the General Counsel and the Union.

I note at the outset that the fact that the applicants had not started work when the Union offered to return is not of itself decisive. The Board has held that an applicant is a permanent striker replacement—even if the striker offers to return before the replacement actually begins work—''if the employer makes a commitment to the applicant for the striker's job.''[2] Finding the moment when the employer has committed itself to hire the applicant is, however, often a difficult task. More and more employers require applicants to undergo one or more of the following: extensive physical examinations, credit and honesty checks, and screening for substance abuse, before permitting them to enter the facility as an employee and go on the payroll.[3] A realistic examination of these hiring practices reveals that often, as here, employment is absolutely contingent on passing such tests; if applicants do not take the tests or if the results are negative, they simply are not hired. Thus, any job offer extended before the tests are taken is conditional at best and commits the employer to nothing until the required screening has been successfully completed.[4] In cases where an employer requires preemployment screening, I would find that a

[5] See *Georgia Highway Express*, 165 NLRB 514, 516 (1967) (permanent hiring standard would be satisfied where it is shown ''that the men who replaced the strikers were regarded by themselves and [the employer] as having received their jobs on a permanent basis''), affd. sub nom. *Teamsters Local 728 v. NLRB*, 403 F.2d 921 (D.C. Cir. 1968), cert. denied 393 U.S. 935 (1968).

[1] Unless otherwise noted, all subsequent dates shall be in 1987.

[2] *H. & F. Binch Co.*, 188 NLRB 720, 723 (1971), enfd. in relevant part 456 F.2d 357 (2d Cir. 1972).

[3] See, e.g., *Transport Service Co.*, 302 NLRB 22, issued today. In that case, as here, the process of hiring an applicant as a replacement was interrupted by the strikers' offer to return to work. There, as here, I would find that an applicant who had not completed the requirements for hire had not attained permanent replacement status.

[4] 188 NLRB at 723 (emphasis added).

firm commitment to hire a replacement occurs when the contingencies attached to hire have been removed and the applicant is free to begin work. In this case, that occurred when the applicants had passed the tests and the Respondent had received the results. The successful applicants were then free to begin work; the only question remaining was when they would start––not whether they would start at all.

This standard is in keeping with prior case law. Earlier cases such as *Binch* have found that individuals who have received an unconditional offer of employment, but who must delay their start date, are permanent replacements. In holding that applicant Rathbun was a permanent replacement, however, the Board in Binch explicitly relied on the fact that ''[h]er acceptance was not conditioned on her getting a [baby]sitter, but rather only the actual date of start was indefinite.''[5] Similarly, in *Binch*, applicant Macey accepted the job offered him; the only issue was that he wished to start on a later date.[6] My colleagues cite no case in which individuals have been treated as permanent replacements who, at the time the strike ended, had failed to remove conditions for hire that affect, not their starting date, but whether they will ever start at all.[7]

The conclusory nature of the majority's reasoning is demonstrated by the poor fit between the facts found by the judge and their summary conclusion that the ''routine'' testing required here did not affect the quality of the offer. The majority's analysis of the Respondent's offers of employment fails to weigh the strong evidence that the Respondent itself viewed the offers as thoroughly conditional. My colleagues point to the assignment of badge numbers, etc., as demonstrating a firm and actualized commitment to hire the applicants. In so doing, they fail to discuss far more compelling evidence of the conditional nature of the offers, i.e., the Respondent's own policy, expounded in the employee handbook and in the form signed by the applicants, that employment depends on the successful completion of the tests. In my view, then, the Respondent's own policies defeat the conclusion that a binding commitment of employment occurred on August 12.

In sum, by equating mere ''magic words'' with a real commitment to hire, my colleagues have gone far beyond the guidance of prior case law. Their holding enables an employer to show that a replacement was hired in a timely fashion with nothing more than self-serving and conclusory testimony that an applicant was ''hired'' before the strike ended regardless of that employer's actual policies regarding the conditions placed on employment. I can not join in such a decision and, accordingly, I dissent.

Robert R. Petering, Esq., for the General Counsel.
William H. Emer, Esq. (Parker, Milliken, Clark, O'Hara & Samuelian), of Los Angeles, California, for the Respondent.
Robert A. Bush, Esq. (Taylor, Roth, Bush & Geffner), of Los Angeles, California, for the Union.

DECISION

STATEMENT OF THE CASE

RICHARD J. BOYCE, Administrative Law Judge. This consolidated matter was tried in San Diego, California, on June 28–29, 1988. The consolidated complaint, based on charges filed by International Association of Machinists and Aerospace Workers, Aeronautical Mechanics Lodge No. 685, AFL–CIO (Union) and by Raymond Clifton McGee, acting in his individual capacity, issued on June 10, 1988, was amended during the trial, and alleges that Solar Turbines Incorporated, Subsidiary of Caterpillar Inc. (Respondent) violated Section 8(a)(3) and (1) of the National Labor Relations Act (Act) on and after August 15, 1987, by permanently replacing 52 economic strikers, consequently refusing to reinstate them, after the Union on their behalf had tendered an unconditional offer to return to work.

Respondent contends that the permanent replacements were hired before the Union's return offer, legitimizing the failure to reinstate. Counsel for the General Counsel now concedes that this was so in 7 instances, reducing to 45 the strikers unlawfully denied reinstatement.

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[5] Cf. *Star Tribune*, 295 NLRB 543 (1989) (applicants for employment are not ''employees'' under Sec. 8(a)(5); no economic relationship exists between an employer and an applicant and the possibility of such a relationship is ''speculative'').

[6] Cases such as *Guenther & Son*, 174 NLRB 1202 (1969), and *Kansas Milling Co.*, 97 NLRB 219 (1951), are not to the contrary. These cases do not hold that an employee who fails to satisfy conditions that can and must be removed before hire is nonetheless a permanent replacement. My colleagues correctly note that I view *Kansas Milling* as inapposite because, unlike this case, it treats the removal of conditions after ''hire,''and that I differ from them in finding that the applicants at issue here, unlike those in *Kansas Milling*, had not yet been ''hired.'' The Board's inquiry in *Kansas Milling* was whether employees could be viewed as having been offered permanent employment if they had not completed probation when the strike ended. Our inquiry here, although it also involves the removal of employer-imposed conditions, is different. I suggest that cases involving conditional job offers such as this one require examining the employer's ''normal employment practices'' to determine, not only whether the job offered is a permanent one, but whether the offer itself constitutes a definite commitment. Moreover, I do not disagree that offers of employment are ''to some extent conditional.'' *Belknap v. Hale*, 463 U.S. 491, 504 fn. 8 (1983). I do, however, recognize differences in degree, so that, depending on the circumstances, some offers, such as those at issue here, fall short of the ''firm commitment'' the Board requires.

[7] The cases cited by my colleagues generally fail to support their holding here. In *Home Insulation Service*, 255 NLRB 311, 313 (1981), enfd. mem. 665 F.2d 352 (11th Cir. 1981), the Board clearly required ''affirmative evidence'' that replacements were hired prior to the offer to return; *Superior National Bank*, 246 NLRB 721 (1979), found that replacements were timely hired because ''a mutual understanding and commitment had been made which included the time those [sic] two employees would actually start work''; in *Georgia Highway Express*, 165 NLRB 514, 516 (1967), enfd. 403 F.2d 921 (D.C. Cir. 1968), cert. denied 393 U.S. 935 (1969), the respondent's argument that it had replaced 52 employees was rejected because it had not borne its burden of establishing that the replacements were hired before the end of the strike; in *Anderson, Clayton & Co.*, 120 NLRB 1208, 1214 (1958), the employees hired as permanent replacements had completed all requirements susceptible to completion before commencing work before the strike ended.

I do not view the cases cited above as relieving an employer of the burden of demonstrating that its offers of employment are firm ones. In my view, a ''firm commitment'' hinging absolutely on the fulfillment of employer-imposed conditions is a contradiction in terms.

The complaint further alleges that Respondent, by Russell Smith, manager of machining, violated Section 8(a)(1) by telling certain strikers on August 14, 1987, that they ''had to resign from the Union . . . to return to work.'' Respondent denies that this happened.

I. JURISDICTION

Respondent manufactures turbine engines in San Diego. It inarguably is an employer engaged in and affecting commerce within Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION

That the Union is a labor organization within Section 2(5) of the Act likewise is unquestioned.

III. THE ALLEGED MISCONDUCT

A. The Failure of Reinstate Strikers

1. Evidence

The Union represents Respondent's several hundred production and maintenance employees. On July 13, 1987, with the expiration of the 1984–1987 bargaining agreement covering those employees, they struck in aid of the Union's position in the negotiation of a new agreement. The strike continued until about noon of August 15, when the strikers voted to return to work.[1] Between approximately 2 and 2:35 that afternoon, a Saturday, the Union informed Respondent by various means—hand-delivered letter, telephone, Western Union Mailgram—of the strikers' readiness to return.

The letter, addressed to Respondent's manager of labor relations, P. E. Boehmke, and signed by the Union's business representative, Matthew McKinnon, was left by McKinnon with a security officer at the gate of Respondent's Kearney-Mesa plant. It stated:

> This letter serves to advise Respondent that the Union is unconditionally offering to return to work effective immediately. Employees represented by the Union will report to work on Monday.

The telephone message, from McKinnon to Respondent's director of industrial relations, Bernard Theule, was to the same effect; and the Mailgram, from McKinnon to Theule and Boehmke, was nearly identical to the letter.

Meanwhile, having advertised in the San Diego newspapers that it was seeking permanent replacements for the strikers, Respondent interviewed a number of applicants in a San Diego hotel on August 12. Over 50 were offered and accepted permanent employment that day, whereupon they were assigned an employee badge number, a job classification, and a department.

On August 12, as well, Respondent told the would-be replacements that they would have to submit to a physical examination and pass a drug screening test before starting to work; and they were required to sign a so-called consent form for preemployment alcohol, drug, and substance screening. This form stated in part:

> I . . . understand that my refusal to sign this form constitutes a violation of Solar's Substance Abuse Policy, and for that refusal I will not be considered for and knowingly waive any possibility of employment with Solar Turbines Incorporated.

Respondent's Policy Manual and a brochure it gives prospective employees both state that it ''will utilize pre-employment screening practices . . . to prevent the hiring of individuals whose use of alcohol or drugs would impair job performance''; that ''an applicant's consent . . . to such a test is required as a condition of employment''; and that ''applicants who refuse to consent to pre-employment drug-alcohol testing will not be employed.''

The would-be replacements submitted to physical examination and drug/alcohol testing from August 13 through 21. Thirteen of the successful applicants underwent these procedures before the Union's return offer, although the issuance of passing laboratory reports preceded the offer as concerns only seven.[2] Some did not pass the drug test, and so did not go to work. The applicants were not paid for time being examined and tested, nor for attending a several-hour orientation meeting the morning of August 15.

Replacements first began working on Monday, August 17, when 12 reported. Another 12 reported on August 20, followed by 20 on August 24, 6 on August 27, and 2 on August 31.

Respondent sought no replacements after August 12, having heard that the strike likely would end soon.

Respondent implemented its final contract offer on July 27, 1987. Among its provisions is a requirement that it give the Union its reasons, in writing, for terminating any unit employee. It did not observe this requirement as concerns would-be replacements denied a place on the payroll because of drug screening. Theule testified that this was because those not yet on the payroll are not subject to the grievance procedure. He conceded, however, that Respondent deems the requirement applicable to the discharge of probationary employees, even though they likewise are not grievance eligible.

The record contains no intimation that Theule said anything about the hire of replacements when McKinnon called him on August 15 with the offer to return, or that he said anything of that nature the next day, when he and McKinnon talked twice more, although he did say on August 16 that 300 to 400 strikers would have to be laid off because of a lack of openings. Theule apparently first broached the subject of permanent replacements during a negotiating session on August 17, when he proposed that the Union acquiesce in Respondent's retention of 64 replacements as part of a strike-settlement agreement.

2. Discussion

The Supreme Court stated in *NLRB v. Fleetwood Trailer Co.*:

> If, after conclusion of the strike, the employer refuses to reinstate striking employees, the effect is to discour-

[1] Even though a new agreement had not been reached.

[2] The 13: G. A. Alvarez, T. Q. Bui, C. R. Chea, R. J. Cordes, S. D. Cullinan, S. M. Fallis, K. J. Hoang, S. L. Johnson, P. N. Kongvongsai, S. L. Layton, H. P. Nguyen, C. A. Porter, and V. V. Than. The seven: Alvarez, Chea, Cordes, Cullinan, Kongvongsai, Layton, and Porter.

> age employees from exercising their rights to organize and to strike guaranteed by . . . the Act. [I]t is an unfair labor practice to interfere with the exercise of these rights. Accordingly, unless the employer who refuses to reinstate strikers can show that his action was due to ''legitimate and substantial business justifications,'' he is guilty of an unfair labor practice. . . . The burden of proving justification is on the employer.[3]

The Court added:

> In some situations, ''legitimate and substantial business justifications'' for refusing to reinstate employees who engaged in an economic strike have been recognized. One is when the jobs claimed by the strikers are occupied by workers hired as permanent replacements during the strike.[4]

With regard to when permanent replacement occurs, the Board takes the view that ''striker replacement applicants . . . obtain the status of striker replacement upon their acceptance of offers of permanent employment.''[5] That is:

> If the employer makes a commitment to the applicant for the striker's job, the Board will normally regard that commitment as a legitimate replacement even though the striker requests reinstatement before the replacement actually begins to work.[6]

The Board cautions, however, that ''the question of what constitutes a real commitment will . . . vary with the circumstances of each situation . . . . ''[7]

Respondent contends that the requisite commitment was made August 12, coincident with the applicants' acceptances of its offers of permanent employment. Counsel for the General Counsel maintains, on the other hand, that the outstanding contingencies concerning physical examinations and drug/alcohol testing deferred commitment, and thus replacement, until those contingencies were removed—which to his thinking happened before the Union's return offer only as to the seven whose passing laboratory reports by then had issued.

An employer can condition its offer to striker-replacements in some respects without defeating the then-and-there sufficiency of its commitment. Thus, its qualifying of the offer to allow for the eventuality of a strike-settlement agreement or a Board order requiring the reinstatement of strikers does not render the offer deficient.[8] Nor, apparently, does a requirement that the replacements pass a physical examination—if the examination is not a condition precedent to their starting work.[9] Further, the imposition of the usual new-hire probationary period on replacements does not preclude permanence from the outset, the Board deeming the replacements in that circumstance to be ''potentially permanent'' pending successful completion of the probationary period, at which time they become permanent ''ab initio.''[10]

In the present situation, unlike the foregoing, the contingencies attending Respondent's offers to the would-be replacements were such that they could not start to work before the contingencies' removal. This suggests—although none of the parties has cited a case in point, nor have I found any—that the August 12 offers and acceptances were less than ''a real commitment'' of the sort demanded by the Board.

The absence of a real commitment, pending removal of the contingencies, is indicated, moreover, by the previously quoted extracts from Respondent's drug/alcohol testing consent form, from its Policy Manual, and from the brochure it gives prospective employees, all of which betray Respondent's view of the testing as a prehire procedure. Revealing, as well, that Respondent did not see itself as having made a real commitment on August 12 was Theule's failure to mention the hiring of replacements in his conversations with McKinnon on August 15 and 16, even though they dealt specifically with the strikers' return; and Respondent's failure to treat those would-be replacements who failed the drug/alcohol test as subject to its termination-notice obligation to the Union.

I conclude, in sum, that the offers and acceptances of August 12 did not then effect the permanent replacement of any strikers. I further conclude that the 13 successful applicants who underwent physical examination and drug/alcohol testing before the Union's return offer[11] had effectively removed the contingencies attached to their hire, thus becoming lawful permanent replacements.[12] I conclude, finally, that Respondent failed to prove that the other 39 permanent replacements became so before the Union's offer; and that Respondent therefore violated Section 8(a)(3) and (1) by failing to reinstate the strikers they replaced.

B. *Russell Smith's Remarks*

1. Evidence

Emanuel Coscia and Arthur Pucci are machinists for Respondent, and were strike participants.

On August 14, 1987, Bill Clauson, a nonsupervisory engineer for Respondent, told them by telephone that they would be permanently replaced if they did not return to work that

[3] 389 U.S. 375, 378 (1967).

[4] Id. at 379.

[5] *Home Insulation Service*, 255 NLRB 311, 312 fn. 9 (1981).

[6] *H. & F. Binch Co.*, 188 NLRB 720, 723 (1971).

[7] Ibid.

[8] *Belknap, Inc. v. Hale*, 463 U.S. 491, 504 fn. 8 (1983). Footnote 8 states: ''That the offer and promise of permanent employment are conditional does not render the hiring any less permanent if the conditions do not come to pass. All hirings are to some extent conditional.'' Respondent, urging an expansive reading of this language, argues that it settles the present case in its favor. The Board takes a narrower view, limiting its application to the circumstances addressed by the Court—namely, offers of permanent employment ''subject to such conditions subsequent'' as a Board order or a strike-settlement agreement. *Hansen Bros. Enterprises*, 279 NLRB 741, 741 fn. 6 (1986).

[9] Cf., *NLRB v. Cutting, Inc.*, 701 F.2d 659 (7th Cir. 1983). The court, concluding that the replacement of the strikers was timely, did not analyze the requirement that the replacements pass a physical. The decision reveals, however, that the replacements could begin working before taking the examination. Id. at 665.

[10] *Kansas Milling Co.*, 97 NLRB 219, 226 (1951).

[11] The 13 are identified in fn. 2, supra.

[12] I disagree with counsel for the General Counsel that only the seven whose passing laboratory reports preceded the Union's offer warrant this treatment. The other six, by submitting to all the underlying procedures, had done all in their power to remove the contingencies as applied to them. To hinge their fate at that point on the accident of when a laboratory report might issue would exalt the arbitrary. I submit that the better approach, borrowing from *Kansas Milling Co.*, fn. 10, supra, is to treat them as ''potentially permanent'' pending a favorable laboratory report; then, upon the report's issuance, as permanent from time of the underlying procedures.

day. Coscia testified that Clauson told him, as well, that he would have ''to have a letter of resignation from the Union'' when he reported. Coscia and Pucci went to the plant following their conversations with Clauson, where they had an exchange at the gate with Smith, Respondent's manager of machining.

Coscia testified that he began the exchange with Smith by saying he had received a call from Clauson ''about coming to work by today and having a letter of resignation from the Union''; then asked Smith what was going on. Smith replied, according to Coscia, ''Well, the only thing I can tell you is, come Monday, there might not be any jobs.'' Coscia countered, so he related, ''You can't put a gun to my head to come to work, so I'll just have to wait til Monday.'' With that, Coscia concluded, Pucci and Smith ''got into it.''

Pucci testified that Smith told him:

> Well, if you want your job, you must go to the union hall, resign from the Union, and bring that letter of resignation back to Smith prior to the end of the shift.

Pucci assertedly responded that he would not do that, but that the members would be voting whether to end the strike the following day. Smith came back, according to Pucci, that that ''didn't matter''—that Pucci would ''have to resign'' from the Union if he wanted his job.

Smith recalled the encounter and its prelude quite differently. He testified that Pucci telephoned him earlier on August 14, asking if Respondent was ''hiring people'' and if he would ''have to resign from the Union'' to regain his job. Smith answered yes to the first question, he testified, and no to the second, adding ''That's your decision to make.''

Smith recounted that the ensuing conversation at the plant included employee Lenny Colbert, as well as Coscia and Pucci, and went like this:

> It started out by Pucci asking if we were hiring, and did he have to resign from the Union. Of course I told him no, that's his decision to make. He asked me if we were hiring. I said yes, we were hiring. And he asked me, when does he have to come to work . . . to be sure that he's guaranteed of a job, and I says ''Art, I can't guarantee you a job unless you come to work now,'' which was immediately.
>
> Then the questioning started all over again, going the same context. I says: ''Wait a minute. Let's end this because we're going over the same grounds again. If you have any further question''—I referred him to call Bernie Theule, and I gave him the number.[13]

Smith testified that neither Coscia nor Colbert spoke during this encounter.

Smith denied telling Pucci, or anyone else, ''that . . . to come to work . . . he would have to submit a resignation letter to the Union.''

By letter to the unit employees dated July 14, purporting ''to clarify information regarding a union member's right to work in the event of a strike,'' Theule stated in part:

> Under the National Labor Relations Act, represented employees have the right to resign from their union. [Y]ou have the right to resign at any time and you cannot be fined for reporting to work during a strike as long as you resign before reporting to work. . . . Whether or not you choose to resign from the Union is strictly your decision. It will have no effect on your employment status at Solar.

2. Conclusion

I credit Smith's version of the encounter in question, together with his specific denial that he said anything approximating the allegedly unlawful remarks attributed to him. Not only was his demeanor convincing, but I think it unlikely that he would express a position so at odds with Theule's July 14 letter. Coscia and Pucci, moreover, did not corroborate one another in critical detail, nor did their demeanor evince conviction.

I conclude, therefore, that Smith did not violate Section 8(a)(1) as alleged.

CONCLUSIONS OF LAW

1. By failing and refusing to reinstate 39 economic strikers immediately on the Union's August 15, 1987 offer on their behalf to return to work, Respondent violated Section 8(a)(3) and (1) of the Act.

2. Respondent did not otherwise violate the Act as alleged.

REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I shall recommend that it be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Respondent having unlawfully failed and refused to reinstate 39 economic strikers immediately on the Union's unconditional offer on their behalf to return to work, I shall recommend that it be ordered to reinstate them to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.[14] I shall further recommend that it be ordered to make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them. Backpay shall be computed in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as set forth in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). Under *New Horizons*, interest is computed at the ''short term Federal rate'' for underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. § 6621.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[15]

[13] Theule, as previously noted, is Respondent's director of industrial relations.

[14] Specific identification of the 39 discriminated-against strikers is left to the compliance phase of this proceeding.

[15] All outstanding motions inconsistent with this recommended Order are denied. If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

ORDER

The Respondent, Solar Turbines, Incorporated, Subsidiary of Caterpillar Inc., San Diego, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to reinstate economic strikers who have unconditionally offered to return to work to their former or substantially equivalent positions, where those positions were not timely filled by permanent replacements and absent any other legitimate and substantial business justification for failing and refusing to do so.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer the 39 economic strikers on whose behalf the Union offered to return to work, and whose positions were not timely filled by permanent replacements, immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights or privileges previously enjoyed, and make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them in the manner set forth in the remedy section of this decision.

(b) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amounts of backpay due under the terms of this Order.

(c) Post at its San Diego, California facilities copies of the attached notice marked ''Appendix.''[16] Copies of the notice, on forms provided by the Regional Director for Region 21, after being signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees customarily are posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director in writing within 20 days from the date of this Order what steps Respondent has taken to comply.

IT IS FURTHER RECOMMENDED that the allegation found to be without merit is dismissed.

[16] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT fail and refuse to reinstate economic strikers who have unconditionally offered to return to work to their former or substantially equivalent positions, where those positions were not timely filled by permanent replacements and absent any other legitimate and substantial business justification for failing and refusing to do so.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL offer the 39 economic strikers on whose behalf the Union offered to return to work, and whose positions were not timely filled by permanent replacements, immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights or privileges previously enjoyed, and WE WILL make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them.

SOLAR TURBINES INCORPORATED, SUBSIDIARY
OF CATERPILLAR INC.